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CRIMINAL PROCEDURE—EXCLUSIONARY RULE—EVIDENCE OBTAINED IN VIOLATION OF A STATUTE IS ADMISSIBLE IF THE STATUTE NEITHER CODIFIES CONSTITUTIONAL REQUIREMENTS NOR CONTAINS ITS OWN EXCLUSIONARY PROVISION—*People v. Brannon*, 32 Cal. App. 3d 971, 108 Cal. Rptr. 620 (1973).

California's implied consent statute provides that a person arrested for driving under the influence of liquor or drugs shall have a choice of submitting to a test of his blood, breath, or urine, and shall be informed that he has such a choice.¹ Relying on the advice of an assistant district attorney that they need not comply with the statute, Fresno County sheriffs intentionally administered a breathalyzer test to defendant without advising him of his statutory right to choose a blood or urine test instead.² In *People v. Brannon*³ the California Court of Appeals for the Fifth Appellate District held that evidence obtained in violation of a statute is admissible if the statute neither codifies constitutional requirements nor contains its own exclusionary provision.⁴

The court used Penal Code sections 844⁵ and 1531⁶ to exemplify statutes codifying constitutional requirements and cited *People v. Greven*,⁷ a case in which the California supreme court stated that "an

1. Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense committed while the person was driving a motor vehicle under the influence of intoxicating liquor

The person arrested shall have the choice of whether the test shall be of his blood, breath, or urine and he shall be advised by the officer that he has such a choice.

CAL. VEHICLE CODE ANN. § 13353(a) (West 1971).

2. *People v. Brannon*, 32 Cal. App. 3d 971, 974, 108 Cal. Rptr. 620, 622 (1973).

3. 32 Cal. App. 3d 974, 108 Cal. Rptr. 620 (1973). Defendant had been convicted of misdemeanor drunk driving in the municipal court. The trial court granted motion for a new trial on the ground that it had improperly admitted the results of the breathalyzer test. The prosecution appealed to the appellate department of the superior court which reversed the order granting the new trial. *Id.* at 973, 108 Cal. Rptr. at 621.

4. *Id.* at 975, 108 Cal. Rptr. at 622.

5. CAL. PENAL CODE § 844 (West 1972) provides:

To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which the admittance is desired.

6. CAL. PENAL CODE § 1531 (West 1972) provides, "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

7. 71 Cal. 2d 287, 455 P.2d 432, 78 Cal. Rptr. 504 (1969).

entry effected in violation of the provisions of section 844 or its counterpart 1531 renders any following search and seizure 'unreasonable' within the meaning of the Fourth Amendment."⁸ The weight of *Greven*, however, is problematical. First, the language quoted above is dictum since the decision turned on facts clearly within the coverage of the statute⁹—rendering any constitutional discussion surplusage. Secondly, the view that sections 844 and 1531 codify the reasonableness requirement of the fourth amendment would make California courts' interpretation of these sections dependent upon the fourth amendment decisions of the United States Supreme Court.¹⁰ The purview of such statutes would expand or contract with changing interpretations of "reasonable" by the United States Supreme Court and thus severely curtail the California courts' flexibility in interpreting California statutes. Thirdly, as a practical matter, the *Greven* language is meaningless. It cannot seriously be believed that if the California supreme court were to exclude evidence obtained in violation of section 844 or 1531, the United States Supreme Court would reverse that ruling if it determined that the statutory violation did not also violate the fourth amendment. Surely the Supreme Court would hold in such circumstances that the California supreme court had made its judgment on an independent and adequate state ground: Penal Code section 844 or 1531.¹¹

The authority of *Greven* must therefore be confined to its facts: the sudden, early morning entry of nine policemen into a house ten or fifteen seconds after knocking at the door¹² violates section 844 of the California Penal Code. Even if such a violation also contravened the fourth amendment's reasonableness requirement, no California court could appropriately reach the issue¹³ since the violation would necessarily

8. *Id.* at 290, 455 P.2d at 434, 78 Cal. Rptr. at 506.

9. See text accompanying note 12 *infra*.

10. See *Sibron v. New York*, 392 U.S. 40, 58-61 (1968).

11. *Cf. California v. Krivda*, 409 U.S. 33 (1972). There the California supreme court had suppressed evidence obtained in a police search of respondent's trash. *Id.* at 34. Since the United States Supreme Court was unable to determine if the California court based its ruling on the United States or California Constitutions, or both, the Court remanded the case to the California court for clarification. *Id.* at 35.

12. 71 Cal. 2d at 290, 455 P.2d at 434, 78 Cal. Rptr. at 506.

13. California courts have excluded evidence for violation of Penal Code sections 844 and 1531 in many cases without comment on any constitutional violation. See, e.g., § 844:

People v. De Santiago, 71 Cal. 2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969); *People v. Mesaris*, 14 Cal. App. 3d 71, 91 Cal. Rptr. 837 (1970); *People v. Hayko*, 7 Cal. App. 3d 604, 86 Cal. Rptr. 726 (1970); *People v. Norton*, 5 Cal. App. 3d 955, 86 Cal. Rptr. 40 (1970); *People v. Boone*, 2 Cal. App. 3d 503, 82 Cal. Rptr. 566 (1970);

be determined on statutory grounds.¹⁴

Whatever the merits of the *Brannon* court's exploration of the extent to which sections 844 and 1531 codify constitutional requirements,¹⁵ it is certain that the court ignored California cases excluding evidence obtained in violation of statutes which clearly are not constitutionally based. California courts have excluded evidence obtained in violation of statutes governing the conditions under which an alcohol concentration test may be administered,¹⁶ the formalities required in making

People v. Martinez, 273 Cal. App. 2d 413, 78 Cal. Rptr. 427 (1969); *People v. Meison*, 261 Cal. App. 2d 322, 67 Cal. Rptr. 750 (1968); *People v. Stevens*, 249 Cal. App. 2d 113, 57 Cal. Rptr. 66 (1967).

§ 1531:

People v. Benjamin, 71 Cal. 2d 296, 455 P.2d 438, 78 Cal. Rptr. 510 (1969); *People v. Hamilton*, 71 Cal. 2d 176, 454 P.2d 681, 77 Cal. Rptr. 785 (1969); *People v. Marquez*, 273 Cal. App. 2d 341, 77 Cal. Rptr. 907 (1969); *People v. Cain*, 261 Cal. App. 2d 383, 67 Cal. Rptr. 922 (1968).

14. But if no statutory violation were declared, the constitutional question would have to be reached. *Cf. Ker v. California*, 374 U.S. 23 (1963) where the Court held that California's judicially created exigent circumstances exception to the announcement requirement of Penal Code § 844 was not unreasonable under the fourth amendment. 374 U.S. at 40-41. Justice Brennan's dissenting opinion, joined by three other members of the Court, argued that the California exception "patently violates the Fourth Amendment." *Id.* at 63.

The exigent circumstances exception permits officers to enter without announcement to prevent escape (*see, e.g., People v. Martinez*, 264 Cal. App. 2d 679, 70 Cal. Rptr. 798 (1968)), to avoid danger (*see, e.g., People v. Stewart*, 11 Cal. App. 3d 242, 89 Cal. Rptr. 707 (1970)), or to prevent the destruction of evidence (*see, e.g., Pierson v. Superior Court*, 8 Cal. App. 3d 510, 87 Cal. Rptr. 433 (1970)). In each case the officer must act on a reasonable and good faith belief that exigent circumstances are present. *People v. Mesaris*, 14 Cal. App. 3d 71, 91 Cal. Rptr. 837 (1970).

15. The *Brannon* court also observed that these statutes are codifications of the common law and that it was this factor that made violations thereof "unreasonable." 32 Cal. App. 3d at 975, 108 Cal. Rptr. at 623. The theory that codifications of the common law are necessarily of constitutional dimension cannot be sustained, especially in the light of *Williams v. Florida*, 399 U.S. 78 (1969). There the United States Supreme Court specifically rejected the argument that common law practices can be deemed mandated by the Constitution in holding that the sixth amendment did not require the states to use a jury of twelve people. *Id.* at 92 n.30, 98-103.

16. CAL. HEALTH AND SAFETY CODE ANN. § 436.52 (West Supp. 1973) provides in part:

The testing of breath samples by or for law enforcement agencies for purposes of determining the concentration of ethyl alcohol in the blood of persons involved in traffic accidents or in traffic violations shall be performed in accordance with regulations adopted by the State Department of Public Health.

In *People v. Foulger*, 26 Cal. App. 3d Supp. 1, 4-6, 103 Cal. Rptr. 156, 158-60 (1972), the court held that the absence of an exclusionary provision did not necessarily indicate an intent of the legislature to allow admission of evidence obtained in violation of § 436.52. It was of the opinion that the legislative intent in the enactment of the statute was that law enforcement agencies would comply with the statute in obtaining evidence from blood alcohol tests and that such intent precluded the use of evidence obtained from tests which did not comply with statutory requirements. The

an arrest,¹⁷ the time limit for the execution of a search warrant,¹⁸ and the direction as to the time of service of a search warrant.¹⁹

The *Brannon* court refused to find in the implied consent statute evidence of a legislative intent to exclude the results of a test under circumstances where defendant is not informed of his choices of the method of testing. The court noted that the legislature had rejected a

Brannon court refused to follow *Foulger*. 32 Cal. App. 3d at 978, 108 Cal. Rptr. at 624. The court did, however, attempt to distinguish *Foulger* on the theory that "the admissibility of a blood alcohol test under the exclusionary rule is conditioned upon the test being taken and performed in a medically approved fashion as part of the requirement of the Fourth Amendment." *Id.* at 977-78, 108 Cal. Rptr. at 624. One wonders why a test not performed in a "medically approved fashion" would be unreasonable whereas a test performed in flagrant and intentional violation of the law would be reasonable. See *People v. Thayer*, 63 Cal. 2d 635, 640, 408 P.2d 108, 111, 47 Cal. Rptr. 780, 783 (1965) where the court suggested that "seizures that exceed statutory authority are always unreasonable."

17. CAL. PENAL CODE § 841 (West 1972) provides:

The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except where the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission or after an escape.

The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.

In *People v. Superior Court (Gaffney)*, 264 Cal. App. 2d 165, 171-72, 70 Cal. Rptr. 362, 366 (1968), the court held that although the statutory requirements of § 841 may be overlooked in exigent circumstances, a failure to observe those requirements renders any evidence found inadmissible if such unusual circumstances do not exist, despite the fact that there is no exclusionary provision in the statute.

18. CAL. PENAL CODE § 1534 (West 1972) provides in part:

A search warrant must be executed and returned to the issuing magistrate within 10 days after date of issuance. A search warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. After the expiration of 10 days the warrant, unless executed, is void.

In *Cave v. Superior Court*, 267 Cal. App. 2d 517, 522, 73 Cal. Rptr. 167, 171 (1968), the court held that a search conducted in a manner violating § 1534 is a "misuse of the statutory process" and any evidence obtained therefrom is inadmissible. Although the argument could have been formulated in fourth amendment terms, the court rested its decision on § 1534 which contains no exclusionary provision. See *People v. Perry*, 271 Cal. App. 2d 84, 105, 76 Cal. Rptr. 725, 741 (1969) (dictum).

19. CAL. PENAL CODE § 1533 (West Supp. 1973) provides:

Upon a showing of good cause therefore, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night; in the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m.

Powelson v. Superior Court, 9 Cal. App. 3d 357, 364, 88 Cal. Rptr. 8, 12 (1970); *Call v. Superior Court*, 266 Cal. App. 2d 163, 164-65, 71 Cal. Rptr. 546, 547 (1968); and *People v. Mills*, 251 Cal. App. 2d 420, 422-23, 59 Cal. Rptr. 489, 490-91 (1967) have held that a failure to follow § 1533 in neglecting to indicate that the search warrant was a night warrant, rendered any evidence seized under that warrant inadmissible.

1969 amendment excluding test results when the arrestee was not informed he had a choice of tests. Instead, the legislature added the current language providing that the arrestee "shall be advised by the officer that he has such a choice."²⁰ The court opined that:

In light of this legislative history demonstrating a refusal by the Legislature to make the evidence inadmissible this court cannot add the same provision. To do so would not be interpreting the legislative intent but would be a gross example of judicial legislation in contravention of the legislative intent logically implied from the rejection by the Legislature of an identical provision. Respect for the doctrine of separation of powers and obedience to the established principles of judicial construction preclude us from so acting.²¹

The court's solemn affirmation of judicial restraint is nothing more than a begging of the question at issue—whether or not evidence is admissible when obtained in violation of a statute neither codifying constitutional requirements nor containing its own exclusionary provision.²² In contending that the judicial exclusion of such evidence would somehow be a usurpation of the legislative function, the court both ignored precedent and revealed a surprising inability to divine the intent of the legislature in spite of clear statutory language that a suspect "shall be advised by the officer that he has such choice."²³ This inability is even more remarkable when one considers that the above requirement was added after the decision in *People v. Hanggi*²⁴ wherein the court refused to reverse the conviction of a defendant who was not given his choice of a blood, breath, or urine test. The *Hanggi* court reasoned that

[i]f it had been intended by the legislature that every defendant . . . should be informed by the arresting officer of a choice of tests in order for evidence pertaining to any test to be received in evidence, such could have easily been provided by amendment to such section.²⁵

One wonders what the *Brannon* court thought the actual 1969 statutory addition was, if not the legislature's clear response to *Hanggi*. The mere fact that the amendment took the form of a command that suspects be advised of their right to a choice of tests rather than a direct exclusionary provision cannot reasonably be considered evidence of a legislative intent to admit evidence obtained in deliberate violation

20. 32 Cal. App. 3d at 977, 108 Cal. Rptr. at 624.

21. *Id.*

22. *Id.* at 975, 108 Cal. Rptr. at 622.

23. CAL. VEHICLE CODE ANN. § 13353(a) (West 1971).

24. 265 Cal. App. 2d Supp. 969, 70 Cal. Rptr. 540 (1968).

25. *Id.* at 974, 70 Cal. Rptr. at 543.

of the amendment. Such a view would reduce the legislature's amendment of section 13353 to a hope or a wish, a pious declaration of intent. Such a position is also difficult to reconcile with the well known principle of statutory construction that legislative enactments affecting judicial decisions are presumed to have been made in response to the decisions affected:

It is a generally accepted principle that in adopting legislation, the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.²⁶

In view of the *Hanggi* decision, therefore, it is clear that the California Legislature did not intend evidence obtained in violation of the implied consent law to be used in court. The *Brannon* court, however, managed to mutate this clear example of legislative intent into a ringing call to the Fresno County Sheriff's Department to defy the law of California.

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²⁶ *People v. Talbot*, 64 Cal. 2d 691, 705, 414 P.2d 633, 642, 51 Cal. Rptr. 417, 426 (1966).